



## **Town of Southern Shores**

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**Planning Board Meeting**

**March 19, 2018**

**5:30 p.m., Pitts Center**

### **MEETING MINUTES**

**TRANSCRIBED BY:**

**PATRICIA MERSKI, RECORDING SECRETARY**

#### **I. CALL TO ORDER:**

Chairperson Sam Williams called the meeting to order at 5:30pm. Planning Board Members Elizabeth Morey, David Neal, Sam Williams, Alternate Member Glenn Wyder, Alternate Member Carlos Gomez, ETJ Representative John Finelli, and Town Planner Wes Haskett were present.

#### **II. PLEDGE OF ALLEGIANCE:**

Chairperson Sam Williams led the Pledge of Allegiance.

#### **III. APPROVAL OF AGENDA:**

Chairman Williams recommended that Item A under New Business to be moved before Item C under Old Business which then puts all three of the variance requests together. This will allow the Town Attorney and the Board Attorney to leave so they do not have to sit through the discussion for the Zoning Text Amendment. Elizabeth Morey motioned to approve the agenda as amended. David Neal seconded the motion. The motion passed unanimously (5-0).

#### **IV. APPROVAL OF MINUTES:**

Chairman Williams stated that he had sent out to Members of the Board his suggested changes to Mr. Haskett with copies to the Board Members. Chairman Williams asked if there were any other suggested amendments. David Neal motioned to approve the February 20, 2018 Meeting Minutes of the Planning Board as amended. Elizabeth Morey seconded and was passed unanimously.

The Minutes of the March 5, 2018 Special Meeting, which discussed the Module Review I and Chairman Williams again stated that he had sent his comments to Mr. Haskett with copies to the Board Members and asked if there were any other amendments and hearing none, David Neal made the motion to approve the March 5, 2018 Special Meeting as amended and was seconded by Glenn Wyder and was passed unanimously.

#### **V. PUBLIC COMMENT:**

Chairman Williams asked if there were any Public Comments from the audience and hearing none, Chairman Williams closed that portion of the meeting.

#### **VI. OLD BUSINESS:**

At this time, Chairperson Williams stated that the Planning Board was now going into Board of Adjustment as a quasi-judicial hearing procedure. The first is to determine if any Board Members have a Conflict of Interest. The purpose is to determine if Board Members should participate in or vote on any matter in a manner that would violate the affected persons' Constitutional Rights to an impartial decision maker. In the determination of this, Chairperson Williams asked if anyone exposed ex parte communications by Members of the Board; that is, has any Board Member communicated, for example, by email or a conversation with any other Board Members, Attorneys or Town Staff and therefore, have to disclose the nature and content of the communication. The second is having a fixed opinion that is not susceptible to change. The third is past familiar business or any other associated relationships with the Applicant and the fourth is any financial interest in the outcome of the matter. If there are any Members that have a Conflict of Interest or a suspected Conflict of Interest, they have to describe what the conflict is and if he or she does not recuse themselves, or is an objection to the Members' participants by the Board, and if no objection, the remaining Members shall, by a majority vote rule on the objection.

The first item: Undisclosed ex parte communication by Members of the Board. Has any Board Member communicated with other Board Members, Attorneys or Town Staff: Ms. Morey – no; Mr. Wyder – no; Mr. Williams – no; Mr. Gomez – no; Mr. Neal – Yes. Mr. Neal had asked Mr. Haskett if he could talk to anyone about this and the response from Mr. Haskett was 'no.'

Chairman Williams then asked if anyone on the Board felt that Mr. Neal's conversation with Mr. Haskett was a Conflict of Interest and all agreed that it was not a Conflict of Interest.

Chairman Williams asked, that prior to hearing the matter, or having a fixed opinion that is not susceptible to change was there a Conflict of Interest: Ms. Morey – no; Mr. Wyder – no; Mr. Williams – no; Mr. Gomez – no; Mr. Neal – no.

Chairman Williams read a Statement on his recusal that he had a situation that may be considered a Conflict of Interest. The Statement read as follows: "As you know, Board Members here wear two hats; one is as a Planning Board Member and one is as a Member of the Board of Adjustment and each has distinct duties and roles. As a Planning Board Member, our concerns have a much broader range of focus; the overall public health, safety and welfare of our community and adherence to the letter of local ordinances.

As a Member of the Board of Adjustment, our roles are often focused on a specific property in the need for a Variance from strict application of those very same ordinances. During the Planning Board Meeting of January 16, 2018, the issue of side yard setbacks where 50' wide lots was discussed as part of the Board's participation in the Town Code update process.

During this discussion, I made a statement to the effect that the Board of Adjustment had already approved three variances that reduced side yard setbacks for these 50' wide lots. It was likely the Board of Adjustment would continue to approve these types of Variances. I don't favor these Variances as a matter of land use planning and policy. However, I will continue to apply the facts of each Variance Application to the legislatively required standards and to cite each on its own and without the shadow of the Planning Board. I do not want anyone, particularly any Applicant before this Board to believe that my personal feelings either good or bad, planning policy will affect my decision as to the Applicant's request for specific relief from a particular Ordinance, and

it will not. In fact, I have voted to approve these Variances because, under the letter of the law, and as the facts reveal during each hearing, the Applicant's property was entitled to relief from the strict application of the ordinance that brought about the matter; therefore, I believe that I do not have a fixed opinion that is not susceptible to change. I'm declaring that I do not have a Conflict of Interest in this matter.

If any Board Member feels that I have a Conflict of Interest and has an objection to my participation in this hearing, please indicate by saying 'aye' and if not say 'no'. If a Member or Members of the Board feel that I do have a Conflict of Interest, the Board Member must vote against my participation in this Variance ruling and a majority vote rules.

Chairperson Williams also stated that having a fixed opinion that is not susceptible to change is a conflict of interest and I will now call for a vote: Ms. Morey – no; Mr. Wyder – no; Mr. Williams – no; Mr. Gomez – no; Mr. Neal – no.

The next is a close familiar business or other associational relationship with the Applicant: Ms. Morey – no; Mr. Wyder – no; Mr. Williams – no; Mr. Gomez – no; Mr. Neal stated that Gray Berryman was a friend and he was on the Planning Board. Chairman Williams asked if anyone on the Planning Board feel that that is Conflict of Interest – all agreed – no. Chairman Williams asked if the Applicant had any objection and the Applicant stated 'no.' Board Attorney Wheless asked will this relationship in any way give the Applicant greater credibility or lesser credibility in your eyes and Mr. Neal stated 'no.'

The fourth and last one is a financial interest in the outcome of the matter: Ms. Morey – no; Mr. Wyder – no; Mr. Williams – no; Mr. Gomez – no; Mr. Neal – no.

Chairperson Williams stated that the Board was ready to move on to the hearing. Town Attorney Mr. Gallop swore in all people who were giving testimony for any of the three Variances: 18-01, 18-02 and 18-03. Chairperson Williams asked Mr. Gallop if the two Variance requests could be heard at the same time as they appear to be the same but for the adjacent lots and Mr. Gallop stated that 18-01 and 18-02 had to be heard separately; however, if findings of fact are applicable between the two they could then be listed as one unless there is different testimony between the two.

Chairperson Williams then declared the evidentiary portion of the meeting open and reviewed the process: Staff to present; then the Applicant can cross examine and any interested public cross examination and then, only those citizens that would be substantially affected by the outcome; i.e., immediate neighbors. Then the Board cross examines and the same process happens for the Applicant and then any interested public statement and any other cross examination. Also, either of the Attorneys would need to be sworn in if giving testimony and neither had to be sworn in.

- A. VA-18-01: Variance Application submitted by Gray Berryman for a Variance from Section 36-202(d) of the Southern Shores Town Code for Lot 9 located at 155 Ocean Blvd.

Mr. Haskett presented the Staff Report (attached) for VA-18-01: Submitted by Gray Berryman and the Requested Action is from Sec. 36-202(d) Dimensional Requirements for the RS-1 Single-Family Residential District and the property is located at 155 Ocean Blvd, Lot 9 and the existing zoning of the properties are RS-1 Single-Family Residential.

Mr. Haskett stated that there is no unnecessary hardship because the property is currently and will continue to be used for a single-family dwelling; the property is 50' wide with a 15' side yard setback and a 20' width for development; both lots when combined meets the Town's minimum lot size of 20,000 sq. ft. and building a 20 ft. wide single-family dwelling on one 50' wide lot it not a hardship.

Mr. Haskett concluded in presenting the criteria that the Board needs to consider if the requested Variance is consistent with the spirit, purpose and intent of the ordinance, such that public safety is secured and substantial justice is achieved.

Chairman Williams asked members of the Board or any interested person in the audience for questions. Chairman Williams wanted to know what would happen if the owner sold one the combined lots and Mr. Haskett stated that it would no longer be under the same ownership and would not be able to build a single-family dwelling and would not be able to recombine if one of the lots were sold.

Chairman Williams then asked if there is anything in the Town's ordinance that states that the lots have to be recombined and Mr. Haskett stated that if a building permit is applied for and where any portion of the structure or proposed work crosses the property line, then the lots must be recombined and Chairman Williams that 50' wide lots were platted before Southern Shores officially became a Town and when did side yard setbacks become effective and Mr. Haskett stated that it was in the early 80's and the Town was officially incorporated in 1979 and at that time there was not an immediate Town Code. Also, setbacks, for a time were 10' side setbacks until 2000 when it was changed to a 15' setback.

Chairman Williams then entered the Staff Report into the evidentiary record to also include the overhead images as presented on the screen.

#### APPLICANT PRESENTATION:

Chairman Williams asked the Applicant to step forward for his presentation and to state his name and residence. Mr. Gray Berryman, 37 Skyline Road, Southern Shores, NC. He stated that his proposal to the Board is to reduce side setback specifically for Lot #9. The lot is currently owned by Mr. James A. Miller and Mr. Berryman is serving as the Applicant and for this lot he also has a contract to buy the lot with the intent to build a home.

Mr. Berryman stated that the question is how the lot exists currently and that with a wider 12' setback, rather than a 15' setback a better house can be built which would be more functional. Chairman Williams asked if the Staff, Board or interested public had any questions and they did not,

Mr. Berryman stated that there are two (2) separate parcels with two (2) separate lot numbers and, currently, under the same address. The existing house and shed cross property lines and are in disrepair; the garage is being used for habitation and is also in disrepair. Chairman Williams asked if there were any questions and Chairman Williams then stated for the Applicant's Application of January 19, 2018 and all exhibits attached be entered into the record.

#### PUBLIC COMMENT

Chairman Williams asked if there were any interested Parties who wanted to speak to come forward.

Mr. Mike Stone, of 8 Sandfiddler Court, Southern Shores stepped forward and stated that he was against the proposed Variance for Lot #9. Mr. Stone stated that he has lived in the Town since 1970 and with the understanding for many years that properties such as this there would need to be a 100' wide lot and 20,000 sq. ft. He also stated that the property has been like this for many years and nearly all of Ocean Blvd and some of the adjacent properties are also constructed of two (2) 50' wide lots. Mr. Stone stated that he is partial owner of multiple properties with two (2) 50' wide lots and does not want to see a Variance granted for building on these two (2) 50' wide lots unless it's impossible and that it should remain a 100' wide property.

Mr. Stone then stated that if it does not remain a 100' property and the Variance is granted, financially this would affect him. He also stated that houses would be going up and properties torn down and Southern Shores would look like areas farther down the beach road in Nags Head and Kitty Hawk where there are many houses with anywhere from 5-12 bedrooms depending on what the ordinances allow and Mr. Stone knows that the Town ordinances have been relaxed.

Mr. Stone stated again that if the Variance is allowed, he believes that Southern Shores will look like areas down the beach with 50' wide lots with narrow houses on them.

Chairman Williams asked Staff, Town Attorney and Members of the Board if there were any questions and Mr. Neal asked Mr. Stone if he had any opinion about how we can resolve a potential problem of people tearing down houses and wanting to build two (2) where there was one (1)?

Mr. Stone stated there have been some 50' wide lots that had been transferred and he also understands the situation where the duplex was. The option was either going back to a duplex or not. He also stated that it may be more of making recommendations to the Town Council or the Ordinances be improved or changed to try to confirm that it cannot be done and if this situation is opened, there could be people flocking to buy these lots, divide it in half and would be less than what one could buy in Kitty Hawk or Kill Devil Hills, based on some of the current prices.

Chairman Williams stated that there are a number of houses that are built on two (2) 50' wide lots that were platted before the Town became incorporated; one person bought two (2) lots and erected one house so that now, that person could tear down the house, put both lots for sale, sell to two (2) different people and because different people purchase the lots, there would be no requirement for recombining the lots?

Mr. Haskett stated that the requirement is that if proposed development is proposed across property lines that the lots would have to be recombined. There are two (2) other situations that he is aware of and can bring up the ordinance on the screen and will look up the code to review the other two (2) areas where recombination is required and Chairman Williams asked Mr. Haskett to do such.

Mr. Haskett referred to Sec. 36-132, (a), 1 & 2 and read it to the Board and audience in its entirety.

Chairman Williams if there were any other questions and Mr. Berryman stated that he wanted to clarify that the Application is about the relaxation of the setbacks and is not about who owns the lot and is not about whether the lot can be developed. It has been clearly established that this Lot can be developed under the current Ordinance and that relaxing the standard is not going to allow the development of a larger structure. In his

opinion, this does not change the number of bedrooms or the number of parking spaces or the lot coverage. The question becomes, is the house 20' wide or 19.5' wide or is it 25.5' wide, but the number of bedrooms remain the same.

Mr. Berryman also stated that he could build a six (6) bedroom house that is 20' long and that would work under the existing Ordinance. Or, could build a larger house here get as many beds in the house to get the rental numbers up or a smaller, less pretty structure. He stated that another way to develop this property would be to do a smaller, higher quality structure that would attract a tenant that is willing to pay more money and this would be more in keeping with the vision of Southern Shores. Therefore, with a relaxation of the Variance, a more attractive, smaller house can be built and gain the same rental income.

Mr. Wyder asked if Mr. Berryman was purchasing both lots and Mr. Berryman stated it will be Lot #9 and Mr. Olin Finch is listed as the person on the survey and he is intending to purchase Lot #10 and the relationship between Mr. Berryman and Mr. Finch is friend/associate.

Mr. Neal asked Mr. Berryman, can you compare the situation to the duplex on the beach road, pro or con, with this situation and ??? stated that the duplex was owned by a single owner and that there were two (2) owners at that time and they were required to title it separately and in this case there is one owner of the lot.

Mr. Berryman stated that when that Application went forward, the Applicant chose to go back and retitle and there was a question about being developed and it was then made abundantly clear that that was not the question and that the Board of Adjustment was deciding it was not an "if" if they could subdivide. The lots could clearly be subdivided and therefore, the Applications are similar; the duplex was not fitting with the vision of the Town of Southern Shores and the duplex was old and in disrepair. In this case, there is one and half houses on a 50' wide lot with a half of house on the other lot, all from 1957 and all are in disrepair and is not fitting with the nonconformities; therefore, they are similar in that regard.

Mr. Wyder asked again if the Lot is currently owned by one person and is it being purchased by two (2) separate people and Mr. Berryman stated yes and that Mr. Finch has, in the past, built a house for him.

Mr. Gomez asked if the house was going to be 1,040 sq. ft.

Mr. Berryman stated that the square footage will be what is allowed for developing a house that can meet the requirements and the Application is instructed to show what it would look like with the Variance and without and that it can work both ways. Mr. Berryman also stated that this would allow an elevator to fit into the house to make it more accessible than without the Variance and, other than the aesthetics, the bedrooms would remain the same.

Mr. Gomez asked if a house be built on each lot and meet the current setbacks. Mr. Berryman stated that if the Planning Board declines the Variance, under the existing code, he can purchase the Lot and build a house on it and Mr. Berryman then asked Mr. Haskett to confirm his statement and Mr. Haskett stated that according to Subsection A, if on or after July 7, 1981, two or more adjacent and vacant nonconforming lots are in single ownership at any time, and such lots individually have less frontage, area or width than the minimum requirements of the district in which such lots are located, then such lots shall be considered and treated as a single lot or several lots that meet the minimum requirements of this chapter for the district in which such lots are located.



Mr. Haskett stated that he could not approve a permit without receiving an Application and formally going through the process and by reading the aforementioned Subsection, is not an approval, but it would be considered in an Application.

Mr. Neal asked Mr. Berryman what his is opinion, as a Southern Shores resident, about the possibility that people will begin to tear down houses on a 100' lot and then want to build two (2) houses and then start to see smaller houses on 50' lots and this actually goes to the heart of what Southern Shores says when it wants 20,000 sq. ft. and 100' front yardage and if Mr. Berryman would consider that good or bad?

Mr. Berryman stated that he would be okay with smaller houses in Southern Shores where there is a 100' lot that is up to 40,000 sq. ft. or more square footage; essentially, what makes more economic sense – to build a very large house, i.e., 6,000 sq. ft and therefore, there would be a Town of very large houses. Also, there is a need for smaller houses and not every house has to be a McMansion and if this goes forward, he is planning on building a four (4) bedroom home. He is okay with smaller houses on smaller lots. He also stated that the Application process for a Variance for each one, in his opinion, is rather convoluted. A decision on how to do this and taking into consideration all the nonconformities on the house on Sky Line Road that was built with 10' side yard setbacks is now nonconforming because the setback requirements were changed and this should be taken into consideration.

Chairman Williams closed the evidentiary portion of the hearing and opened the Argument Portion of the Hearing.

Town Attorney Gallop stated that the real issue is a timing issue and if looking back at the other Variances and if there was a structure and it was demolished and then the lots were sold separately and, if, looking at the current considerations that Mr. Haskett reviewed, the way this structure was probably built, under 2A and it was after 1981 or it could have been built before that time when there were no restrictions; but, that allows you to build without recombining. In Section 36-132, (a), 3, the trigger for the recombination is a proposed structure and we do not have that here as there is a structure. What that indicates is that it goes back to the question of whether or not there is an unnecessary hardship and in this case, can the property, as it exists, be used for something reasonable and it can. It can be used for the single-family residence that is already there across the two property lines.

Town Attorney Gallop also stated that if Mr. Miller were to demolish the structure and then sell the properties separately, and first, what Mr. Berryman has done is an excellent example; he has thought ahead before getting into a complicated process of building and constructing to get the Variance, but, we have to look at the facts as they are on the ground today and not as they will be in the future. The facts that are in front of the Board are the facts that were on the ground as of that time and in all of those other cases, in my recollection, is that the lots were empty and the two adjacent lots were actually owned by separate people and none of these things would have allowed them to build, except for one which allows them to build a single-family residence but they would have been limited by the side yard setbacks as we've discussed tonight, but, is not what the facts on the ground are because there is a single-family residence that is still here and if Mr. Miller demolished the residence and sold the properties we would be in the same situation.

Town Attorney Gallop also stated however, if Mr. Miller sells the properties BEFORE demolishing it and then the new owners demolish it, they are going to have an issue with

Standard #3 which would result in the hardship by the actions that they took and there are a number of different steps to get this right and where we are right now, the facts are on the ground. There is no unnecessary hardship because there is a structure there that can be used as a single-family residence and has been used as a single-family residence; therefore, it is a single-family residence.

At this time, Mr. Gallop referred to the Statute prior to 2009, the Standard for Variances was considerably different at that time and it was 'no unreasonable' hardship and tonight there is nothing that indicates that this was an unreasonable hardship because, basically, what the Law said at that time was that if there is any use, anything that one could do with the property, and, if it's not completely, economically zeroed out, then there was no reasonable use, but that shifted to an 'unnecessary hardship' and has not been as well defined as 'reasonable' was.

Mr. Gallop continued, 'Reasonable' was actually easier to deal with because it either was or wasn't but, this doesn't fall toward the exceptional remedy of the Variance that 'unnecessary' probably should cover because there is a use for the property as it currently exists on the ground today under the facts presented and that may or may not change. But, at a minimum, if this Variance is granted and because we are in a situation where there are steps that would need to be taken, there should be adopted conditions that require for those steps to be taken. The structure should be demolished and that the lots actually be sold to separate parties and that he feels that Mr. Berryman's intent is to do that, but, just because there is a real estate deal in the works doesn't necessarily mean that it comes together at the end. The Board wants to make sure that the process went ultimately with what the Board expected if it was decided that there was an 'unnecessary hardship' and granted the variance.

Chairman Williams then asked for Argument from the Applicant and Mr. Berryman stated that the current structure meets very few of our Ordinances, is below the minimum square footage, and is not in good repair to continue to be used as a house and a garage with two septic systems and doesn't think that this is a reasonable use going forward.

Chairman Williams then closed the Argument portion of the Hearing and then reopened the Argument portion based on Mr. Gomez's question (who asked it to be reopened) if the two lots be developed separately meeting the 15' setback the way they are and that would make a big difference.

Mr. Gallop replied, if the existing house is demolished and the two (2) lots are sold separately, then they each could be developed separately. If under separate ownership under the current Standard, they don't necessarily need to be sold but one would at least have to change hands so that the two (2) lots be under separate ownership. If Mr. Miller retained one (1) lot and they were under separate ownership then (referring to the top portion of Standard #1), the problem doesn't keep them from building a single-family residence on it, but, the only thing that is exempt under Standard #1 is width and area and all the other dimensional requirements, including setbacks, would apply unless they are varied or fall under one of the exceptions.

Mr. Wyder asked if the lots are sold to two gentlemen and the house is not demolished, what is the legality of that? Now there is one house on two (2) separate lots owned by two (2) people, is that okay or does an agreement have to be in place concerning the demolition?



Mr. Gallop replied: Should that come up there could be zoning enforcement issues because there is a requirement that you have one (1) use per lot and at best it would be a nonconforming situation; that if there were any changes and at this point he has not had to consider that. As to someone who wanted to separately own 50' wide lots that where there was an existing structure and would continue to use the structure, that is something he has not dealt with.

Mr. Wyder stated that I am not suggesting that they continue to use the existing structure, I am asking, would the structure need to be demolished before the sale of the two (2) lots to two separate owners; would that need to happen or can two separate people; new owners or a new owner and the existing owner, can these two people own two (2) separate lots with a structure crossing the property line?

Mr. Gallop replied: I think they can own it and there may be some zoning enforcement issues and if they wanted to keep the structure, there could be issues if one of them decided that they don't want to demolish it and the other one does, but, that doesn't keep them from selling the parcels.

Chairman Williams stated: The two (2) lots are currently owned by one person and if that person decided to sell both of the lots and he sells those lots to one other person, that one other person has to recombine those lots and Mr. Gallop responded: "no." They do not have to recombine unless they are proposing a structure that crosses the property lines. 36-132, (a), 3 requires the recombination, the key there is 'proposed structure' and we have an 'existing' structure and not a 'proposed' structure and the existing structure could stay if it's in single ownership.

Chairman Williams asked: If the two (2) lots are in single ownership and in that single ownership they want to develop both of the lots. Mr. Gallop stated: If they want to develop both lots, then they are going to have a 'proposed structure' ultimately because the existing structure will get in the way and they will have a 'proposed' structure. 36-132, (a), 2, (b) or 36-132, (a), 3 would be triggered and it would probably be 36-132, (a), 3 because 132, (a), 2, (b) is only triggered when there is a nonconforming lot adjacent to a conforming lot and neither of these lots are conforming and then 36-132, (a), 3 says that when 'a nonconforming lot' is adjacent to one or more under the same ownership and where any portion of a 'proposed' structure is to be located on two or more of the lots, they will have to combine into a single lot. So, a single owner would not be able to build two (2) structures under 36-132, (a), 2, (b).

Chairman Williams then asked: Could he build one structure on each of the 50' lots and Mr. Gallop stated: 'No', not without recombining them and Mr. Haskett again quoted Section 36-132, (a) where it addresses lots and single ownership: 'Such lots shall be treated as a single lot or several lots'.

Chairman Williams stated so, can it be clarified that the owner, under single ownership, two (2) 50' wide lots, he could, if under same ownership could develop the two individually with the smaller home on it? Mr. Gallop replied: "No" and stated that what Section 36-132, (a) means is that you treat it without the recombination and that is how these houses were built, crossing the property lines because there is a requirement that you can't have but one primary structure on the lot and my reading of Section 36-132, (a) has always been that, if you own two (2) lots together and if 36-132, (a), 2, (b) or 36-132, (a), 3 don't make one recombine for a proposed structure crossing the lines, then they have to be treated as one. I don't think you can build on every one of them, but this has not come up and this was not the prior consideration.

Mr. Gallop stated: The intent of any Town is adopting areas like this to bring things into conformity and ultimately, the reason for any nonconforming provision is to, over time, require conformity and the language is more complicated than necessary. In general, it does push towards conformity, but, this situation has caused some issues.

Chairman Williams asked: Because a 50' lot is nonconforming? And Mr. Gallop replied: Correct, because, right now, it has to be a 100' wide lot to be conforming, so a 50' lot is nonconforming, but there were a lot of 50' lots in the Town before that were legally nonconforming. If it was illegally nonconforming, say, there was a subdivision requirement, for 50' lots or a zoning requirement and at some point someone made a 35' lot, it wouldn't necessarily be nonconforming because it would not have met the code at the time it was done before the 50' lots, there wasn't anything to prevent them from being in existence and they were legal at the time they were made.

Chairman Williams wanted to clarify in his mind and stated: Mr. Miller owns two (2) 50' wide lots with one structure on it that is in disrepair and Mr. Miller decides to sell the lots or at least one of the lots; if he sells one of the lots, that lot can be developed, is it a legally nonconforming lot? Mr. Gallop replied: "yes". And Chairman Williams continued: If Mr. Miller sells both of the lots to the same person, do both of those legal, nonconforming lots, can both of those lots be developed separately. Mr. Gallop replied: I don't know and then stated, It would have to be in the same ownership to trigger any recombination.

Chairman Williams said that he thought Mr. Gallop said that a conforming lot next to a nonconforming lot, under the same ownership and only the two legally nonconforming lots next to each other and what Chairman Williams is trying to determine is, can those two (2) separate, nonconforming lots be developed separately if owned by the same person?

Mr. Gallop replied: Typically, I would say, 'no' and that the attempt with Section 36-132, (a) is to treat those as one lot although the term 'or several lots' is complicated and where we may be complicating this is that, historically, everyone has probably used Section 36-132, (a) to build a structure like what exists or to use it all and say, "I've got ten lots that are 10' wide and I have 100' so I can build on these two lots in the corner and you can then treat it as one lot and then there would not be any recombination. People typically build bigger houses in Southern Shores across lots than building smaller houses by breaking up the lots.

Mr. Gallop stated: Going back to the concept of the design on nonconformity provisions is to end the nonconformity and over time, it would not be consistent to treat that as being able to treat every lot separately and to be able to say, "I have a bunch of 35' lots and I'm going to develop one of them but you're going to give me the lot coverage and width as if I have 10 lots" and that would not be consistent with what nonconformity provisions are trying to do.

Chairman Williams asked: Are there nonconforming provisions in the Ordinance that says that we have to go toward larger lots and Mr. Gallop replied: If you don't have these provisions, then the rule says that you have to have a 100' lot. Chairman Williams stated: But, since there is this rule, it's very hard to read Section 36-132, (a) but there is a phrase in there about several lots and whether or not they shall be considered and treated as a single lot or several lots that meet the minimum requirements of this Chapter of the District in which lots are located

Chairman Williams then asked: If treated as several lots it still meets the requirement under this ordinance and Mr. Gallop replied: That is one way to read it but he does not believe that is the intent and doesn't matter for consideration at this meeting because that is not why we are. Where we are is 1) we do have a single-family residence that crosses both properties and 2) we have Mr. Berryman proposing to have the lots sold to separate people.

Chairman Williams stated: So, the two (2) lots will be sold to two separate people and Mr. Gallop replied: Mr. Berryman to buy one and Mr. Finch the other and Chairman Williams asked: Two different owners? And Mr. Gallop replied: Those are the facts for tonight and until tonight he had not considered the one owner to build multiple houses on the lots.

Mr. Gallop stated you can build a single-family home on any lot that was of record years ago without regard to its area or width, but, it doesn't say without regard to the setback or other requirements, so, one can definitely build on those but there is not a recombining requirement that is triggered by Section 36-132, (a), 3 because there would not be anything to recombine.

Mr. Gallop also stated: Section 36-132, (a) says that even if it doesn't go across the property line and if it is now after July 7, 1981, then it's treated as if it's recombined even though you won't have some actually to combine. It's probably the second hardest provision of the Town of Southern Shores Code that Mr. Gallop has ever had to work with and at this point, no one is sure what July 7, 1981 meant and his guess would be some form of adoption of the zoning ordinance, but, it's probably more likely an amendment because it doesn't say it anywhere else that he is aware of.

Mr. Berryman stated that it is difficult language to understand and luckily, the Applicant is asking for relief from the strict interpretation of the setback requirement on Lot #9 and is not asking to interpret or change that. Mr. Berryman stated that he has spent the last two months deciding whether to draw a 20' house or a 26' wide house and that is the question. That is his decision as the future owner of this Lot and what does the house look like. I'm only asking for a Variance for the setback requirement for Lot #9.

Chairman Williams then asked Mr. Stone to step forward and Mr. Stone stated: This is just a technicality of what has been discussed about a single owner trying to take his 100' wide lot and build two (2) houses on each 50' section of the lot: The individual needs to be talking entity because a lot of properties are in an LLC and owned by individuals or multiple individuals. If there is a rewrite it needs to be addressed as any owners of the original LLC which would address the second half of the property because things can be transferred in such a manner of an LLC by just changing a letter but it's still the same people.

Chairman Williams then closed the Argument portion of the hearing.

Chairman Williams then opened the Consideration and Deliberation portion of the hearing by the Board of Adjustment – Discussion:

Mr. Neal stated that we are in a unique and not very comfortable situation and that we're like a policeman with a bad law and the Council. I hope, no matter what we do and I move that this go to Council and have Council specifically address the 50' lots. Or address how to deal with setbacks on smaller lots because we have an attitude in our Town that we want 100' of frontage and 20,000 sq. ft. lots. We have many exceptions that do exist: 60', 80' and some 50' and everyone that has 100' can see the advantage

of selling a 50' lot and possibly making more money. I think Mr. Stone has a good point that this will drive a movement to start tearing down the older homes and building smaller houses on smaller lots and he (Mr. Neal) has no problem with smaller houses on smaller lots. Mr. Berryman will build one of the most beautiful houses you will ever see, but the Council, the Town, needs to decide this and not us. The Council needs to get together and hear from the Town and put this picture out there because not everybody realizes that in looking at a GIS map of Ocean Blvd and all the red lines mean there are 50' lots.

Chairman Williams stated that we are going to be judging this Variance against four standards and the standards are set by the State; i.e., unnecessary hardship, and things like this are the determination we are going to have to make. In my mind, it is a relatively simple determination as we're talking about side yard setbacks and when we talk about this and the review of the Town Code, we have basically made the decision that we, the Planning Board, would handle these and the Board of Adjustment on a case-by-case basis. I think that what we are looking at, when you look at the four standards, are going to cause some people to not like our decision or like our decision because we are confined by these standards. So, I think, that because of the discussions tonight, we understand the issue and I think, that considering the specifics of the Variance request, VA-18-01 and I think that, at least I am ready to vote and I don't know if other Members of the Board have anything else.

Mr. Wyder asked: Mr. Chairman, the Town's Zoning Ordinance Section 36-367 clearly states that in order to grant the Variance it has to qualify on all four counts, is that correct and Chairman Williams stated 'yes'; in fact, I'm going to describe the process.

Chairman Williams stated: The process that we have to go through for granting a Variance, there are four standards that have to be approved for each Variance that comes before the Board. Each of these standards are voted on separately and requires a four-fifths vote to approve a standard and that means that for each of these standards, if there is more than one vote against approving the Variance, that standard does not pass and that means that the Variance would be denied.

Chairman Williams proceeded to read the standards: Standard #1 – unnecessary hardship would result from the strict application of the Ordinance. It shall not be necessary to demonstrate that, in absence of the Variance, no reasonable use can be made of the property; Standard #2 – Neither pure economic losses nor a required abatement of the violation rise to a level of unnecessary hardship:

The vote: Ms. Morey – yes, there is no hardship, if that is correct? And Mr. Wheless said, let's restate the question: Does a strict application of the Ordinance result in an unnecessary hardship to the Applicant? "Yes" would be in favor of the Variance and "No" is to deny the Variance.

Ms. Morey stated: "Yes"; Mr. Wyder – "No"; Chairman Williams – "Yes"; Mr. Gomez – "Yes" and Mr. Neal asked to have the yes or no explained. Does a strict application of the Ordinance result in an unnecessary hardship to the Applicant and Mr. Wheless replied: "Yes" to approve the Variance and the widening of the setbacks and Mr. Neal voted "Yes". Vote was 4 Yeses; 1 No.

Mr. Wheless stated that in order to help the Board draft or to help in this instance, to draft an order detailing what facts exist that were heard in the Testimony or what was in the Application and the Town's written responses that will help the Board determine the unnecessary hardship. Mr. Wheless also stated that Mr. Berryman, in his Application,

has indicated that the structure at 20' may be a little more dangerous/difficult to get in and out and is less functional, less aesthetically pleasing. Also being able to widen the setback and create a 26' home is the converse and would probably allow an elevator to be more accessible and a safer structure to get in and out of.

Chairman Williams stated: Those points are ones that I considered stronger and that is why I voted "yes."

Chairman Williams: Standard #2 – The hardship results from conditions that are peculiar to the property, such as location, size or topography. Hardships resulting from personal circumstances as well as hardships resulting from conditions that are common to the neighborhood or the general public may not be the basis for granting a Variance.

Mr. Wheless asked to state it differently: Does the hardship that you just said existed, does that hardship result from conditions that are peculiar to the property such as location, size or topography?

Chairman Williams called for the vote: Ms. Morey – Yes, is in favor of the Variance; Mr. Wyder – No; Chairman Williams – Yes; Mr. Gomez – Yes; Mr. Neal – Yes. Chairman Williams recorded the vote as: 4 Yeses and 1 No.

Mr. Wheless stated: In terms of the facts, we note that these particular lots are 50' lots which were created prior to the enactment of the Zoning Ordinance and the 'imposition' of setbacks. So 50' is odd in a way, so the size of these particular lots are unusual. Chairman Williams stated: That is the main reason that I voted "yes", that these are only 50' lots.

Chairman Williams read Standard #3: "A note here – voting "Yes" on this Standard is for a denial of the Variance. The language says 'the hardship did not result from actions taken by the Applicant or Property Owner. A better way of stating that is – does the hardship result from actions taken by the Applicant or the Property Owner? And the act of purchasing the property with the knowledge that circumstances exist may justify the granting of the Variance shall not be regarded as a self-created hardship so the basic question is: Does the hardship result from actions taken by the Applicant or Property Owner?

The Vote: Ms. Morey – No, which is in favor of the Variance; Mr. Wyder – No; Chairman Williams – No; Mr. Gomez – No and Mr. Neal – No. Chairman Williams recorded the vote as 5 Nos and the reason for the "no" vote is that the hardship did not result from the actions taken by the Applicant. The hardship is a result of the size of the lot.

Chairman Williams read Standard #4 – The requested Variance is consistent with the spirit, purpose and intent of the Ordinance such as the public safety is secured and substantial justice is achieved. Vote: Ms. Morey – Yes; Chairman Williams – Yes; Mr. Neal – Yes; Mr. Wyder – Yes; Mr. Gomez – Yes. Chairman Williams recorded the vote as 5 Yeses. The reason being that public safety is secured and substantial justice is achieved.

Mr. Wyder stated that the reason he voted against the first two Standards was because he felt that a true hardship needed to be established.

Chairman Williams stated 'that's fine and the reason we're stating it now is that when Mr. Wheless and Mr. Gallop put the official record together they can state in the record the

reason for that. If there is a denial and an Appeal by the Applicant the record of this meeting is what goes to Superior Court.

Mr. Gomez stated that a 26' home would be safer than a 20' home. Mr. Wheless stated: Mr. Gomez, you may have your thoughts and ideas about a 26' wide home being safer and this is actually in the record as well as in the Application that was undisputed and the Applicant has alleged that as well and is that where you (Mr. Gomez) are getting at?

Mr. Gomez replied "no", he knows it's in the Application, but his own experience justified his statement and wanted to clarify that a 26' home is safer and will resist wind damage and that it is more of a structural reason.

Ms. Morey asked for a 90 second break and Chairman Williams granted that and Chairman Williams restated the results of the votes:

Standard #1 – 4 Yes; 1 No  
Standard #2 – 4 Yes; 1 No  
Standard #3 – 0 Yes; 5 No  
Standard #4 – 5 Yes; 0 No

Chairman Williams stated: The decision is to grant the Variance and Mr. Wheless interjected: Before continuing, Chairman Williams might want to have Ms. Morey return before officially saying the Variance was granted. There will be a motion to approve the Variance, although you approved the four Standards, you need a broad motion to approve and then you may want to consider any conditions that you believe are appropriate for the granting of the Variance, if any.

Ms. Morey returned and Chairman Williams stated: The decision is to grant the Variance and a motion needs to be made that confirms the Board's action on the Variance. Mr. Wheless stated: That motion would sound something like; "We move to approve the Variance as applied for" unless you have conditions and Mr. Gallop had suggested that there may be two appropriate conditions. I'm not sure when these conditions need to be met. I'm guessing before the Building Permits are applied for, that the structure on these particular lots be demolished and secondly, at the same time, at or before the issuance or submission of the application of the Building Permits, that the two lots be owned by separate individuals or entities. If those are conditions you wish to impose then in making your motion you would 'so say'.

Chairman Williams stated: I move that, on a 4-0 vote, the Board of Adjustment granted the Variance Request, VA-18-01 to permit reduction of side yard setbacks, on the 50' wide lot at 155 Ocean Blvd, Lot #9 with the conditions that the structure currently on the lot be demolished. Chairman Williams doesn't like the idea of granting a Variance for one lot requiring a separate ownership on a second lot. Do I have a second? And Mr. Gomez seconded the motion.

Mr. Neal asked for clarification from Chairman Williams: You said a 4-0 "yes", and Chairman Williams stated "yes" that was the vote on the Standards. The four Standards were all to approve the Variance and that all four Standards were approved and not four members voting.

Ms. Morey stated: Mr. Chairman, your motion, if Lot #9 is purchased just be the new Owner and Chairman Williams stated "yes" and Ms. Morey stated: You now have two lots under two ownerships and even if the second lot, Lot #10, stays under the current ownership, your motion says that for Lot #9, for the Variance to be approved, you want a new Owner and you want the structure to be demolished?



Chairman Williams replied: "yes". Ms. Morey stated: You don't care about the ownership of the other lot? Chairman Williams stated: For the second lot, "no", I don't feel it's appropriate. Ms. Morey clarified, the Lot we're granting the Variance on, you don't care about the ownership change? And Ms. Morey continued: You're just saying that, in order for the Variance to be approved, the structure on Lot #9 needs to be demolished? Chairman Williams stated: yes. Ms. Morey stated she is just trying to understand and that the motion had already been seconded. She also stated: Can you tell me why you require that the structure be demolished in order to meet the vacant lot as in the Code – is that your thought process and Chairman Williams stated "yes".

Chairman Williams stated: I would like to slightly amend my motion so that it reads, "on a 4-0 vote on the Standards" which wasn't there before the Board of Adjustment granted the Variance Request on VA-18-01 to permit a reduction to side yard setbacks on the 50' wide lot at 155 Ocean Blvd and Lot #9, under the condition that the structure on the Lot be demolished. Mr. Wheless asked Mr. Gomez to confirm his 'second' and Mr. Gomez replied: "Yes." Chairman Williams asked: All in favor signify by saying "Aye", all opposed and the "Ayes" have it and the Variance was granted on a 4-1 vote with Glenn Wyder voting no.

Chairman Williams thanked the Staff, the Applicant, the Public and the Board of Adjustment for their participation in the hearing and declared the hearing closed.

- B. VA-18-02: Variance Application submitted by Gray Berryman for a Variance from Sec. 36-202(d) of the Southern Shores Town Code for Lot #10 located at 155 Ocean Blvd. The Request is to reduce side yard setbacks on a 50' wide lot at 155 Ocean Blvd, Lot #10; the previous Variance was for Lot #9.

Chairman Williams stated: Does any Board Member have a Conflict of Interest from what was done for Variance 18-01 and if not, we don't have to go through the same because 18-01 and 18-02 are very similar. As for the swearing in of people giving testimony, Mr. Wheless had already done that for all three Variances. Does the Staff have anything new to offer and Mr. Haskett stated: "no", the Staff Report on VA 18-02 is virtually the same, although this is for Lot #10, not Lot #9.

Chairman Williams asked if the Applicant had anything new to add and Mr. Berryman stated: "no" and asked does any Interested Public have anything new?

Mr. Stone stepped up and stated: I don't have it in front of me, but if Mr. Haskett could pull up the Section about what was discussed earlier, where he thought it states something to the effect that it was not the intent of the Ordinance to do what was voted on in VA 18-01, Lot #9. Chairman Williams stated that he would like to add the Staff Report (attached) to the record and then asked Mr. Haskett to bring up the Ordinance that Mr. Stone was referring to. Mr. Haskett read Sec. 36-131, (a) and it was added to the record.

Chairman Williams then opened the Argument portion of the Hearing and asked if there was a need to go through the Arguments again and the Board stated "no". Chairman Williams stated that: to follow the format and since the Interested Public brought something up that was new, did Staff have any Cross Examination of the Interested Public and Mr. Haskett stated: "no".

Chairman Williams asked the Board of Adjustment if there were any questions for Mr. Stone. Mr. Neal asked if Sec. 36-131, (a) could be further explained as it applies to what was done with the prior Variance.

Mr. Gallop stated: What this section is saying is exactly what was said in the Argument prior – the intent of the nonconformities are not expanded and that they do away. In a nutshell, that is what that paragraph is about and it doesn't preclude the Board from granting a Variance in this situation as long as the Standards are followed that are in the Board of Adjustment Chapter for granting Variances. Further, while not necessary, Section 36-132, (a), 1 where it says, that if the Lot meets the area width one can build a single-family residence on it, it also states that a Variance of yard requirements shall be obtained only through the actions of the Board of Adjustment as established in Article 12 of this Chapter as long as it's not a 'use' provision or a measurement provision and that wasn't necessary. But, for clarification, it states that you 'can't'. Mr. Gallop has no issue with the fact you can consider a Variance as was explained prior and didn't think, at that time, it was applicable under the particular facts but can definitely be considered in this case.

Chairman Williams then closed the Argument portion of the Hearing. Chairman Williams opened the Consideration and Deliberation portion of the Hearing and asked the Board if anyone wanted to make any new or different comments or arguments. Hearing none, as far as the process for voting and the Standards that were stated for Variance 18-02 are: Standard #1, to simplify Chairman Williams asked Mr. Wheless for his copy to make it more understandable. A strict application of the Ordinance would result in an unnecessary hardship to the Applicant – yes to approve; no – no to deny the variance; Ms. Morey – yes; Mr. Wyder – no; Chairman Williams – yes; Mr. Gomez – yes; Mr. Neal – yes. The vote was: 4 Yes; 1 No.

Mr. Wheless stated: Mr. Chairman, we're going to find all of the same facts as were in the earlier hearing and is that objectionable to anyone and the response was "no". Mr. Gomez stated: Unless someone finds fault later. Mr. Wheless stated: We are going to support each of our findings with the facts that are before the Board. Chairman Williams asked if the vote would still be on all of the Standards and Mr. Wheless stated: "yes".

Standard #2 – Does the hardship result from conditions that are peculiar to the property, such as location, size or topography? A "Yes" would be a vote to approve the Variance and a "No" vote would be to deny the Variance. The vote: Ms. Morey – Yes; Mr. Wyder – No; Chairman Williams – Yes; Mr. Gomez – Yes; Mr. Neal – Yes. The vote was 4 – Yes and 1-No. Mr. Wheless stated: Unless anyone has anything else to add, we will find the same facts as in the previous hearing.

Chairman Williams read Standard #3: "A note here – voting "Yes" on this Standard is for a denial of the Variance. The language says 'the hardship did not result from actions taken by the Applicant or Property Owner. A better way of stating that is – does the hardship result from actions taken by the Applicant or the Property Owner? And the act of purchasing the property with the knowledge that circumstances exist may justify the granting of the Variance shall not be regarded as a self-created hardship so the basic question is: Does the hardship result from actions taken by the Applicant or Property Owner?

The Vote: Ms. Morry – No, which is in favor of the Variance; Mr. Wyder – No; Chairman Williams – No; Mr. Gomez – No and Mr. Neal – No. Chairman Williams recorded the vote as 5 Nos and the reason for the "no" vote is that the hardship did not result from the actions taken by the Applicant. The hardship is a result of the size of the lot.

Standard #4 – Is the Variance consistent with the spirit, purpose and intent of the Ordinance such that public safety is secured and substantial justice is achieved? A Yes vote means to approve; a No vote means denial. Ms. Morey – Yes; Mr. Wyder – Yes; Mr. Gomez – Yes; Chairman Williams – Yes; Mr. Neal – Yes. The vote is 5 – Yes; 0 – No. Chairman Williams stated: The decision is to grant the Variance and a motion was made on a 4-0 vote on the Standards. The Board grants the Variance Request that VA-18-02 to permit a reduction to side yard setbacks on a 50'wide lot at 155 Ocean Blvd on Lot #10 with the condition that the structure on said Lot be demolished. Mr. Gomez seconded the motion. All in favor signify by saying "Aye", all opposed and the "Ayes" have it and the Variance was granted on a 4-1 vote with Glenn Wyder voting No.

Chairman Williams closed that part of the Hearing and again thanked the Staff, Public and the Board's participation and closed the hearing on Variance 18-02.

C. VA 18-03: Request for a Variance pertaining to the encroachment for decks and stairs into the rear setback area at 46 Spindrift Trail, Southern Shores, NC.

Chairman Williams wanted to determine if any Member has a Conflict of Interest. #1: Determination if anyone has a Conflict of Interest, undisclosed ex parte communication by any Members of the Board. Has any Board Member communicated with other Board Members, Attorneys or Town Staff: Ms. Morey – No; Mr. Wyder – No; Mr. Gomez – No; Mr. Neal – No; Chairman Williams – No. #2 – Prior to the Hearing the matter, does anyone have a fixed opinion that is not susceptible to change: Ms. Morey – No; Mr. Wyder – No; Chairman Williams – No; Mr. Gomez – No; Mr. Neal – No. #3 – A close familiar business or other associational relationship with the Applicant: Ms. Morey – No; Mr. Wyder – No; Chairman Williams – No; Mr. Gomez – No; Mr. Neal – No. #4 – A financial interest in the outcome of the matter: Ms. Morey – No; Mr. Wyder – No; Mr. Gomez – No; Chairman Williams – No; Mr. Neal – No. Chairman Williams also stated: The Hearing, as far as swearing in all the people giving testimony were sworn in earlier prior to the Hearing on VA-18-01 and declared the Hearing open and asked Staff to present.

Mr. Haskett read from the Staff Report (attached). The existing Zoning is RS-1, Single-Family Residential and the physical characteristics for that property are developed as a single-family dwelling and on the screen is the image of the survey that was submitted with the Application. The applicable regulations are Chapter 36 of the Zoning Ordinance, Article 3-Interpretation and Definition of Terms; Article #5- Nonconformities; Article #7-Schedule District Regulations and Article #12 Board of Adjustment. Section 36-367 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment shall vary any of the provisions of the Zoning Ordinance upon a showing of all the following and Mr. Haskett read the Provisions and Staff Comments from the Staff Report.

After Mr. Haskett's report, Chairman Williams asked if the Applicant had any questions for Mr. Haskett and he replied: "no". He Also asked Members of the Board if there were any questions and Mr. Gomez asked Mr. Haskett if he knew how high the lower deck is from the ground. Mr. Haskett responded that according to the Application, a portion of the deck is in violation of 30" above the ground which is 39". Mr. Gomez asked if it was sloped and Mr. Haskett replied: "yes" and the Applicant can verify.

Mr. Wyder asked: Are both decks together or are they considered one? Mr. Haskett replied that one is a cantilevered deck that is above another story, then there is another ground level deck and stairs so they are two different decks that are being addressed. The cantilevered being above and then the ground level. A photo submitted with the

Application shows the image of both. Mr. Wyder then asked: Was the cantilevered deck permitted and Mr. Haskett replied: Yes. Mr. Wyder asked: was that later inspected and approved by the Inspector at the time and Mr. Haskett replied: "yes".

Mr. Wyder then asked: Did the Inspector, at the time, not realize that it was beyond the setback and Mr. Haskett stated that he had not seen any notes to that affect that addressed the setback.

Mr. Wyder wanted to state for the record: If the Town of Southern Shores came out and inspected the deck in 1999, the nonconforming deck was approved and at that time did they not notice that the deck below was 39" above ground and they were not there to inspect that particular deck when they were on the property? Mr. Haskett stated: The cantilevered deck was constructed in 1999; the ground level deck was constructed in 2004. When the cantilevered deck was inspected, they would not have been able to see the 2004 ground level deck. Mr. Wyder asked: When the pool was done, that was a completely separate part as seen on the plan, so there was no need for anyone to go back and inspect the ground level deck that is extending beyond the requirements? Mr. Haskett stated: The pool was permitted and inspected after the ground level deck and stairs were constructed. Mr. Wyder asked: And there was no notice or mention of the ground level deck? And Mr. Haskett replied: From the Town's perspective, he did not find anything in his review of the files and that the Applicant does have in his Application communication between himself and the Permit Officer who was employed at that time and the Applicant will address that.

Mr. Gomez asked: Was there an 'as built' survey and Mr. Haskett stated that he believed there is and that this is what is shown on the screen which was required at the time of the deck and pool being built.

Mr. Neal asked: How did this come about as an issue? Mr. Haskett replied: A local realtor came to him with the question of whether or not the encroaching deck could be given relief if a Variance was granted and that he (Mr. Haskett) does not have the authority to do so, only the Board of Adjustment has the authority to issue the Variance; therefore, they came forward and submitted the Application. Mr. Neal asked: When the pool was applied for in 2007, was there a Site Plan submitted and Mr. Haskett stated: he did not have the file with him but assumed that a Site Plan was submitted which demonstrated compliance with the lot coverage; setbacks, etc.

Mr. Wyder asked: If the Variance is not granted, what action will the Town request the homeowners to take. Mr. Haskett replied: We would follow up with the violation of the ground level deck being over 30" and it would have to be removed. The portion that encroaches, not the portion within the setback and he was not ot sure about the cantilevered deck, not sure about the action, he would have to consult with the Town Attorney or Town Manager.

Mr. Wyder then asked: How much of that deck is above the 30" and Mr. Haskett replied: no measurements have been taken at this time. The Applicant can answer but likely it would be a portion of it and at the bottom of the stairs since it's almost at grade level.

Chairman Williams stated: I think you are saying two different things, I thought you said at one point that the deck would have to be removed back to 30" and at another point you stated that it would be moved to the setback line. Mr. Haskett replied: The Applicant would be required to remove what encroaches into the 25' rear setback. Chairman Williams asked if that was the setback point and Mr. Haskett stated: Anything

within the setback would be allowed to remain as long as it is not over 30". If in viewing the Site Plan Survey on the back 25' building line, the dotted line that runs across the deck, where you can then see where it encroaches and where it does not, anything that encroaches over 30" is a violation of the Zoning Ordinance and consequently, we would have to follow through with the enforcement.

Mr. Neal asked: What violation is that, is it a deck violation and Mr. Haskett stated: Any structure within a rear setback requirement, anything over 30". Mr. Neal asked: Is there any part that is behind the setback more than 25' back and is there no rule about the 30" in the Ordinance and that he may be misunderstanding the 30" requirement. Mr. Haskett stated: If it is under 30", it is allowed to encroach and that is why there is the ground level deck area and stairs. Anything under 30" is allowed to go up to the property line based on the definition of "yard" that was previously read.

Chairman Williams asked: Is it some sort of walkway and Mr. Haskett stated "yes" – anything less than 30" wouldn't be considered an encroachment.

Mr. Gomez asked: Did the Applicant come to the Town saying they have a problem they would like to rectify and Mr. Haskett replied: Mr. Haskett initially explained the process to the Realtor that inquired and the Applicant submitted the Application. The Applicant contacted Mr. Haskett and that Mr. Haskett did not contact the Applicant regarding the violation. In phone conversations with the Applicant, Mr. Haskett explained the process and the Applicant submitted the Application and was not instructed to do so and no Notice of Violation was issued. Mr. Haskett stated: A permit was for the cantilevered deck, then the swimming pool and the deck for the pool. Mr. Gomez asked: Is it possible that some of the sand behind the deck could have blown away? Mr. Haskett stated that the elements could possibly affect it. Mr. Gomez asked if sand could be brought in and Mr. Haskett stated that Staff is going by the conditions of the property currently. Mr. Gomez asked: Could the height of the grade be increased and Mr. Haskett said he had not considered that but it could be a possibility and would have to review the definitions, etc.

Chairman Williams asked to have the Staff Report entered into the Evidentiary Portion of the Hearing and asked for Applicant Presentation.

Robert Moore, 381 Main Street, Mars Hill, NC came forward and stated that he had purchased the home at 46 Spindrift Trail in 1999 and immediately had a cantilevered deck constructed over the top deck because that is narrow and extended it and thought it was secured with a permit. The ground level deck was constructed in 2004 by Southern Scapes and he admits that it was his negligence by not checking on the permit but had asked the builder if he would apply for the permit and the builder agreed. Mr. Moore's experience had been that the builder secures the permit and Mr. Moore pleads guilty in not making sure the permit was obtained and is not here to blame anyone.

Mr. Moore stated: In 2007, he contracted with a company to put in a pool and it then came to his attention when Mr. Meekins called Mr. Moore (resided in Maryland) and told Mr. Moore that there was a deck violation and they couldn't go ahead with the pool until the deck was taken care of. Mr. Moore then spoke with Ms. Forrester of the Planning Department of Southern Shores at that time and told her what had happened and that there was a violation of a 25' setback of the ground level deck and a portion of the other deck and had subsequently discovered there was a permit for that. While on the phone, Ms. Forrester thought about it and gave Mr. Moore the 'go ahead' to build the pool and again, Mr. Moore assumed that it being a ground level deck that there was no problem because it was considered part of the yard and the builder proceeded to put in the pool.

Mr. Moore stated: He completely forgot about this issue until Mrs. Moore's brother then came to own the property and lived there for 3-4 years then decided he wanted to sell it and agreed to put it on the market. Mr. Moore was asked to complete an application form for the Realtor and a question about knowing of any existing code violations on the property and Mr. Moore checked "no". And, in thinking more about it and not knowing for sure, Mr. Moore wanted to check to make sure he got in touch with the Realtor and Mr. Haskett and filed the Application.

Mr. Moore stated: The topography in the back when they moved in was short of decks and there were narrow decks on the 2nd and 3rd levels and the topography slips down by 30 degrees. When they moved in, they cleared out a lot of the back yard when then prompted them to put in the deck. Mr. Moore stated: He was not aware of the 30" requirement and thought he had the permit. Mr. Moore then provided the Board with color photos of the aforementioned area.

Mr. Moore stated: On the ground level are built in benches on each side and the steps go down to the 39" and to tear that down would create a hardship. He stated that he had contracted with a Contractor to build the lower deck and a permit was not issued. He looks at this as an original Application for his Variance, and his argument would have been then, as it is now. If the Variance is denied it will substantially decrease the usability of the property w/o the deck. It will cost a lot to tear it down and does understand that this is his fault and would ask the Board to consider the hardship and feels that all the other stipulations have been complied with. It is in character with the neighbors and this doesn't encroach on the neighbors at all. The neighbors can hardly see it through all of the trees. He also stated: It is a wide and narrow lot that is not very deep because of the wetlands behind the house which is where the deck goes out to.

Chairman Williams asked if Staff had any questions and Mr. Haskett asked: Based on a review of the colored photos, that at the bottom of the stairs of the ground level deck there is grass around it and not sandy like a dune? And Mr. Moore stated that he believes is it sand but has not had much contact with the house over the last 4 years. Looks like pavers at the bottom of the stairs and Mr. Moore stated that as the steps reach the ground, pavers were installed to make it level to walk on and the yard has been heavily mulched. Mr. Haskett referenced page #13, is there sand around it and is it grass, sand or mulch and Mr. Moore stated that he thinks it's mostly sand. Chairman Williams stated that in reviewing the picture it looks mostly like mulch and grass and not sandy. The pictures submitted by Mr. Moore were officially entered into the record.

Chairman Williams asked any Interested Public has any questions and also asked the Board of Adjustment Members for questions.

Mr. Gomez asked if it would be possible to have 9" of sand.

Ms. Morey asked Mr. Moore: On the ground level deck, did you build that without a permit, is that correct? Mr. Moore replied that that is what it comes out to be in 2004 and a permit was not secured. Ms. Morey asked: The cantilevered deck, was there a permit and Mr. Moore stated that there were drawings submitted to the Town, approvals obtained and the Notice was posted. Ms. Morey asked if Mr. Moore would be okay with adding some material, such that would meet the requirement and Mr. Moore stated he would have no problem doing that.

Chairman Williams asked: Is everything cleared back to the lot line and Mr. Moore stated "yes". Chairman Williams asked: Do the neighbors' lots run down to the wetlands and



Mr. Moore stated "no" but then stated Mr. Whitely's property is on the southern side and that portion of the property goes to the wetlands. Mr. Whitely has a deeper property because the wetlands end before they cover his property and also has a swimming pool. The property on the other side does not back up to the wetlands.

Mr. Neal asked: Under the Zoning encroachments, can uncovered porches encroach into 3' into the setback and Mr. Haskett stated "yes" on the front setback.

Mr. Gomez asked: Did Mr. Moore consider speaking with the Chicahauk Property Owners Association (CPOA) to make the setback work? Mr. Wyder responded that he is the President of the CPOA and can speak to the Bylaws which would preclude the Association from granting any additional property if that is what is being suggested. Mr. Gomez stated: On the north side, he could surrender that to the Association in exchange for the 2'. Mr. Wyder stated that it would not be a simple process and that the process would be extraordinarily difficult in that it would require significant work in getting everyone who owns property there to vote. He also stated: There is a requirement in the Bylaws that any time they do anything with any property that belongs to the Association, there is a majority vote that needs to be taken and approved; therefore, he doesn't think it would be a viable option.

Chairman Williams asked: When you were ready to install the pool and talked to Mr. Meekins, the surveyor, was the issue raised of a possible setback violation at that time? Mr. Moore replied: He didn't know what to do so he called the Town and related the problem and his Proposal was an Application for a Zoning Variance and that is when he had the discussion with Ms. Forrester. She told him to go ahead and have the pool installed and he thought at that point it had been dealt with. Mr. Moore stated: Ms. Forrester stated she saw no Application and Mr. Moore stated that that was the reason for the phone call and an Application had not been filed because it was the first time he knew no Application had been filed. Mr. Moore stated: He interpreted his conversation with Ms. Forrester as giving him the 'go ahead' to install the pool and no problem with any code violation which led him to check off 'no' in the real estate application. He also stated that he would be amenable to putting sand underneath the deck to bring it up to 30".

Mr. Gomez asked: Do any of the other municipalities, citing Currituck, with wide open spaces have setbacks that run from 30' to 10' and does Southern Shores have anything close to that in an Ordinance and Mr. Haskett replied "no".

Chairman Williams then closed the Evidentiary portion of the Hearing and then Mr. Wheelless stated: The Applicant had supplied photos: #9A, #9B, #10, #11A, #11B, #12A, #12B and #13 and these were accepted into evidence and Chairman Williams stated: "yes" to be entered into the Evidentiary Record along with the Application.

Chairman Williams opened the Argument portion of the Hearing.

Mr. Gallop stated: Unfortunately, this is a situation that comes up a lot and is not abnormal for either to be built w/o permits by a Contractor and someone like Mr. Gomez comes through later and finds out something was built in the wrong place like Mr. Moore found out and was built without permits and put in the wrong place. It's not uncommon even for the cantilevered deck for a situation to arise where a Town grants permits that could or shouldn't have been granted outside of the Variance content and the reason for this explanation. It doesn't matter to the Variance but will give an understanding on how the enforcement process would work because we're not here to consider because it's not part of the Variance. Mr. Gallop continued: Property Owners are estopped from

challenging the Town from coming back on permits that were improperly granted and that is historically how it has always been in North Carolina. Since a case in the 30's, if a Property Owner can't say that the Town granted the permits, do I get to keep what I have if the Town brings enforcement action. It can't be stopped from bringing that action by a prior mistake or permit issuance. To back track, that is different than what we deal with in civilian life that is unrelated to government; we make a mistake and we always have to pay for it.

Mr. Gallop continued: What the law has determined is that it doesn't have that in place and that if Mr. Haskett grants all of his best friends and family all sorts of illegal violations to the Town Code, then the Town can never go back and fix it. What the Case Law has determined is, we don't have to prove 50 years after the fact that it was corrupt and if it's improper and if it wasn't invalid then it wasn't valid and the Town can take enforcement action. The reason for the explanation is because it's an interesting concept that a lot of people do not understand but doesn't want the Board tonight, in considering the Variance into account, whether the Town could or couldn't do anything and in this case, the Town Staff has not done any enforcement. They may have some discretion to do whatever enforcement necessary and there are different ways to deal with it and that's a different question than what is being considered tonight. For the Variance, what we're really dealing with is, unfortunately, an economic problem and Mr. Wheelless can tell you that and at this point Mr. Gallop quoted from one of David Owen's book: "The financial cost of compliance alone, in this case, the relocation of an improperly placed concrete slab for a building under construction is insufficient to establish the requisite unnecessary hardship." That is David Owens quoting the case of showcasing realty in the City of Fayetteville Board of Adjustment.

Mr. Gallop continued: Again, the personal situation of the Applicant or the convenience does not qualify the Owner for a Variance consideration. What we're talking about tonight, unfortunately, is, as Mr. Haskett has stated in the notes and in his Staff Report, the Owner has a problem with his Contractor who got it wrong initially, but, unfortunately, we are in the typical case where we are 15, 10 years down the road and the Owner doesn't have a whole lot that can be done with the Contractor but this is not abnormal which comes up all the time. The rare case is when the Owner figures out that the Contractor screwed up within the Statute of Limitations and can then actually get the Contractor to rectify the problem. This is unfair and unfortunate but it is not an unnecessary hardship under the Law as it currently reads.

Chairman Williams stated: As he understands it, is that the cantilevered deck, even though it extends into the setback, since a building permit was issued, final inspection done and approved that there is nothing that can be done? And Mr. Gallop replied: If you don't take into account and there is a reason to consider the Variance and it meets the standards, absent that, then I think it could be considered as a Variance but you would have to treat it like they were going to do it and not that it was already done. You need to worry about the enforcement process that may happen or may not happen because that's a personal circumstance and that's not something that is peculiar to the property. What the Variance is meant to do is to take into account exceptional situations where you have a weird shaped property or weird topography that you can't fit a setback because of how the property is designed. It's related to the property and not the people. So, the consideration of whether or not the Town could enforce or not enforce whatever violation may exist is a personal consideration and not related to the property and whether or not the Variance should be granted or not.

Mr. Gallop continued: If you grant the Variance and find that the Town was negligent, that won't be valid. There will have to be a reason that is supported by the property and

not by the situation. Chairman Williams stated: As it extends into the rear setback, and we don't grant the Variance and if we say it that way, they would have to do something because it's in violation of the setback, is that what you're saying. Mr. Gallop replied: It might and that would be another step in the potential process and there is no Notice of Violation that has been handed to the Applicant.

Mr. Gomez stated: There may be other ways to resolve the issue and that may go toward the denial of the Variance and it may not be an unnecessary hardship where there are other ways to solve the issue. The problem is, Mr. Haskett has to review the fill rules and can we really know what can and can't be done to solve it. There may be other ways and in looking at the Site Plan, can the deck be slid around to the side. Without having an engineer or surveyor or contractor, there may be other ways to solve the problem without the Variance and that would go toward a 'denial' but, just because it's in violation or in the setback certainly doesn't support a Variance.

Mr. Wyder asked: If they were to bring the lower deck into compliance by changing the grade beneath it to bring it up to the 30", the problem still remains and based on what you have said that if they bring the bottom deck, done without a permit into compliance, that, even though the Town issued the permit for the cantilevered deck, inspected it and approved it, that they are still liable for that deck to be removed, if that's what the violation calls for? Mr. Gallop replied: Just the mere fact that the permit was issued for something that was improperly issued does not preclude the Town from taking enforcement action and under the Law, it will not preclude the Town from taking enforcement action. Mr. Meekins let the Applicant know that the deck was improper at that time and went back to Ms. Forrester and that is how it commonly happens. I don't know if the Town will seek enforcement which is up to Mr. Haskett and the Town Manager but just the fact that it can enforce is the main point.

Chairman Williams asked if the Applicant had any additional comments and Mr. Moore stated again, that they were innocent in all of this. What they thought they were doing when he offered to Ms. Forrester that he would pay whatever fine necessary to the Variance and was totally unaware of the process which is not an excuse. Mr. Moore asked: unless this is cleared up, if that can be done, what would in the future affect the sale of the house if there was a code violation on the record?

Chairman Williams closed the Argument portion of the Hearing and opened Consideration and Deliberation by the Board.

Chairman Williams made a motion For denying the Variance Request with one condition that the cantilevered deck remain as is even though it extends into the setback area and that he is not a proponent of filling under any part of the lower deck to bring it into compliance. That will open a can of worms for someone who wants to do something in a setback area or any of the setback areas saying, "I'm going to put in a gazebo and will bring in the fill to bring it up to the point where it now qualifies so, he is not in favor of that. Chairman Williams stated: Basically, I intend to vote against the Variance with the condition that the cantilevered deck stay in place.

Mr. Gomez stated: If you grade the lot and you have an area where you put a deck and an area that is less than 30", he feels it's fine and in this case, it's going the other way in grading to make sure it fits. The other is the cantilevered deck which is hard to fix.

Mr. Wheless stated: I don't think you can deny a Variance but under that a part of an offending Ordinance violation remains in place; it is in violation. It may be a better analysis to take each separately and let the facts and the four inquiries, provided by the

Legislature, rule how you determine what is granted and what is denied. Then you would have two inquiries; one for the cantilevered deck and one for the deck itself which may be applicable to get it done.

Chairman Williams stated: We would have to vote on two different situations rather than just the one and Mr. Wheless stated that in denying the request for the Variance you have no authority to allow a violation to continue. The Variance that has been requested included both and so, I'm suggesting a way to look at both as to looking at each separately. Chairman Williams stated: We would go over the set of four Standards twice and Mr. Wheless replied: That is his suggestion but this was not something he foresaw when he came to the meeting, but if you were to deny the Variance you would have no authority to allow the cantilevered deck to remain. By allowing it to remain by granting the Variance and if you're going to do that that you would need to offer an analysis.

Mr. Wyder stated: Based on Mr. Gallop's input, I would have to agree that the Variance would have to be denied and I understand that when something is legislated, it is what it is and given the fact that two adjacent projects connected to this situation, were inspected twice by a Town official, it doesn't excuse the nonpermitted deck, but it does raise the question of how the home owner would be required to remove and reconstruct. The potential is that it can't be used as a criteria, but he will put that out to the Town and Mr. Haskett to say that this is a consideration that, when it comes time to think about whether or not there will a violation enforcement. These facts should be considered and Mr. Gomez was in agreement.

Chairman Williams stated: Before the vote, I would like to hear Mr. Moore's idea of handling the ground level deck separately from the cantilevered deck because if we just go through and deny the request, then something has to be done with the cantilevered deck and Mr. Wheless stated: By something, do you mean an enforcement action and Chairman Williams stated: "yes".

Mr. Wheless stated: We don't know that and Chairman Williams stated: if they are separated we can express our feelings as whether it can be approved or denied – two different parts of the violation and Mr. Wheless stated: "yes".

Mr. Wyder asked: Can we separate them when they've been presented as a single Variance and Mr. Wheless replied that he didn't know but it seemed to him that if there is one Variance Request which can be seen as separate violations/issues to be addressed. Mr. Gallop stated: the Town would not object and asked Mr. Moore if he objects and he said "no" and that would clarify it on the record as to what the Applicant would like. Mr. Wheless stated: The Applicant is the person who put forward the Application that way it is stated and both have come together and to work with what we have.

Mr. Wheless asked Mr. Moore: Would you like this Board to consider the cantilevered deck as one issue and the ground deck as the other issue? That may be what the Chairman and the Board can do and Mr. Moore stated that it was fine with him. Mr. Moore did state that he thought it was two separate issues to begin with until he saw the approval for the cantilevered deck. He also asked if there was anything that he can do by lowering part of the deck and Mr. Wheless stated: We are here with a Variance request and the Board is powerless to offer you some other way to cure this but for the Variance which you have requested. Theoretically, if one or both of these issues were denied, those issues could be reopened with Mr. Haskett with a different way to remedy this situation and Mr. Wheless stated that as to the bifurcation of splitting apart of the two

violations, do you have any objections to them assuming the Board would do them and Mr. Moore stated "no".

Mr. Haskett stated: When he first spoke with Mr. Moore, I believe he asked the question as to should we do these separately or the same and it was me who said they should be done at the same time as one Variance Application with one fee for both issues.

Mr. Neal stated: You can't deny something and put conditions on it even if we bifurcate but, if you pass the Variance you can then have conditions and Mr. Wheless stated: "yes". Mr. Gomez stated: It would be easier to bring the dirt up; can we deny that part of the Variance and Mr. Wheless stated: Not certain if you're talking about if it were denied and Mr. Gomez stated: The Applicant could withdraw on the lower deck or part of it and Mr. Wheless stated: "yes".

Chairman Williams stated: Let's lay out the possible options so the Board can decide on how to address them: #1: Would be to vote on the Variance as presented and if it is denied, then enforcement action could be taken not only against the ground level deck but also against the cantilevered deck. #2: Would be to vote on the ground level deck and the cantilevered deck separately with the Standards and again there is no guarantee that it would be approved or denied. #3: If based on what Mr. Wheless has stated, would be for the Applicant to withdraw his Variance Request and depending on what Mr. Haskett determines, as far as fill goes, make that correction so there is no longer a need for a Variance. With the three options, the first two, if looking at the Standards to vote, doesn't guarantee denial or approval of the Variance. The third option doesn't guarantee that it's going to be acceptable to the Town depending on what Mr. Haskett finds on the fill. Which of the three options does the Board want to do?

Mr. Wyder: The third option would require the Applicant to withdraw and Mr. Gomez asked Mr. Haskett if there would be any problem with putting fill under the deck and Mr. Haskett stated that he could not answer that tonight. Chairman Williams stated: If the Applicant withdraws his Application and you discover that the fill is an option the Applicant would have to decide what he wants to do from there and Mr. Haskett replied: "that's correct".

Chairman Williams stated: Before proceeding, is the Applicant willing, if the Board decides to go that way, is the Applicant willing to withdraw his Application and Mr. Moore stated: "yes". Mr. Wheless stated: We just established that if we go forward, the worst-case scenario is denial of the ground level deck but which could still be remedied afterwards. Chairman Williams stated: With the cantilevered deck as the worst case, the cantilevered deck would have to be modified somewhat. Mr. Wheless stated: If Mr. Moore withdrew his request for one or both of these and then met with Mr. Haskett and no remediation was possible under the Ordinance, there would be another \$350 fee to return and consider this again.

Mr. Moore stated that he would do whatever to have this done and would work with Mr. Haskett. He also asked: what will happen to the cantilevered deck if he withdraws this and then comes to the same resolution on the ground level deck, where does that leave the cantilevered deck? Chairman Williams stated: If you withdraw the Application, it would become a Town enforcement issue and Mr. Haskett stated that it would become a decision of the Town as to whether or not the Town wanted to enforce the issue. Mr. Wheless stated that that is the decision even if the Variance is denied and Mr. Haskett replied: "Correct."

Mr. Wheless stated: If your position gets any worse, the worst-case scenario right now is that the Board denies both Variances and you still meet with Mr. Haskett. Mr. Moore

stated he doesn't want to do that, it would be worse than withdrawing and working with Mr. Haskett and trying to mediate something. Mr. Wheless stated that that replied to his comment.

Chairman Williams asked: Does the Board want to vote for the Variance as written or to separate them into two parts? Ms. Morey – prefers together, but if the majority disagrees she is okay with that decision.

Mr. Wheless asked for someone to make a motion and it would not be four-fifths, it would be for a full majority and Mr. Neal made the motion to move to pass the Variance with two conditions that the 4' deck be worked out between Mr. Haskett and Mr. Moore, probably with a foot taken off because you can encroach 3'. Mr. Wheless stated: The motion is premature because the analysis has not been done and where we need to be is to look at the cantilevered deck separately from the rear ground level deck or whether to go ahead and take both issues as a whole. Go into the four findings and then the result will be clear. Mr. Neal motioned to look at both issues together and Mr. Wyder seconded and Chairman Williams called for a vote. All in favor of the motion indicate by saying "aye" and would be passed by a majority vote.

Chairman Williams stated: Standard #1: Does the strict Application of the Ordinance result in an unnecessary hardship to the Applicant and it shall not be necessary to demonstrate that in the absence of the Variance, no reasonable use can be made of the property? Ms. Morey – No to deny the Variance; Mr. Wyder – No; Mr. Neal – Yes; Mr. Gomez – No; Chairman Williams – No. Vote was 1 yes; 4 No. Ms. Morey stated: The decks could be constructed on the other side of the house that would be within the permitted building area and there is plenty of room on the lot for more decks to be constructed or moved, Mr. Wheless stated: No permit was obtained, could have been obtained, should have been checked on before things were heard in evidence. Chairman Williams stated that the Standard also says that neither pure economic losses nor required abatement of a violation rise to the level of unnecessary hardship.

Standard #2: The hardship results from conditions that are peculiar to the property such as location, size or topography. Hardships resulting from personal circumstances as well as hardships resulting from conditions that are common to the neighborhood or the general public may not be the basis for granting a Variance. Ms. Morey – No; Mr. Wyder – No; Mr. Neal – Yes; Mr. Gomez – Yes; Chairman Williams – No. Vote is 2 Yes and 3 No.

Standard #3 – A 'yes' vote in this case signifies denial of the Variance. Does the hardship result from actions taken by the Applicant or the Property Owner? A "yes" vote is for denial of the Variance. Ms. Morey – Yes; Mr. Gomez – No; Chairman Williams – Yes; Mr. Gomez – No; Mr. Neal – No. Vote is: 3 Yes; 2 No.

Standard #4 – The requested Variance is consistent with the spirit and purpose and intent of the Ordinance such that public safety is secured and substantial justice is achieved: Ms. Morey – No; Mr. Wyder – No; Chairman Williams – Yes; Mr. Gomez – Yes; Mr. Neal – Yes. Vote is: 3 Yes; 2 No.

To recap the votes: Standard #1: 1 Yes; 4 No; Standard #2: 2 Yes; 3 No; Standard #3: 3 Yes; 2 No; Standard #4: 3 Yes; 2 No.

Chairman Williams stated if the variance is denied, the decision can be appealed, the Board's decision can be appealed to Superior Court to deny. As for the motion to deny on a 3 to 1 vote on the Standards, the Board of Adjustment has denied the Variance



request for VA-18-03 to permit the encroachment of decks and stairways into rear setbacks at 46 Spindrift Trail. Mr. Gomez seconded and all were in favor.

Mr. Wheless stated: Mr. Chairman, you or any other members of the Board may want to go on record to offer your thoughts on the cantilevered deck permitting issue and the strict reading of your charge and by the Legislature puts you in this position or if there are any thoughts or guidance.

Mr. Wyder stated: I Just want to reiterate what I stated earlier, that understanding that the Board had no choice but to deny this Variance and he finds it strange that two of the three projects that took place on this property were permitted, inspected and approved by Town officials. The Applicant came to the Board of his own volition, but the bottom line is, to the Town and he finds it a hard choice but had to vote "no".

Chairman Williams stated: The fact is the way the Law is written was a big factor in the Board denying the Variance but hopes that the Town, in working with the Applicant, can come to a consideration on the cantilevered deck that permits it to stay and not have to be removed and the reason I say that is, that it was permitted, inspected and approved even though into the setback.

Mr. Neal stated: I Second the comments with the conditions of adding fill to the base of the near ground level deck that would make the ground deck legal and to allow the cantilevered deck that was originally approved.

Chairman Williams thanked the Participants and closed the Hearing and now the Board of Adjustment will revert to the Planning Board.

D. ZTA-18-01, Shared Parking submitted by Southern Shores Crossing to amend the Southern Shores Town Code by amending Section 36-163, Off Street Parking Requirements (John Finelli participating in the discussion and voting as the ETJ Representative).

Chairperson Williams called on Mr. Haskett to present the Staff Report (attached). Mr. Haskett stated that the Application was up for consideration at the February 20, 2018 meeting and the Applicant chose to table this consideration so they could make some revisions to the Ordinance. The Staff Report remains mostly unchanged and applicable Land Use Plan Policy still is the same. The Recommendation remains the same and will note that in the analysis the modifications include that within any one site or on contiguous commercial sites, the required parking for any number of separate uses may be combined on the site or sites but the number of parking spaces assigned to one use may not be assigned to another use except as provided in the proposal. Parking spaces required for one use may be used to meet the parking requirements of another use on the same site or on contiguous parcel or parcels when the peak hours of operation and demand when the use of parking uses occur at different times of day.

Note from Chairman Williams: Ms. Morey had to leave.

Mr. Neal stated that when this was heard before that it would be rewritten clearly and Mr. Haskett stated that is why it was tabled and the rewrite was basically wordsmithing and a few questions that needed to be answered.

Chairman Williams called on the Applicant's representative to give his presentation.

Mr. Michael Strader of Quible & Associates stepped forward as the Engineer of Record for the Zoning Text Amendment and took the feedback from the Board and incorporated that feedback into the rewrite.

Chairman Williams had a few changes: Page 3/9, line 35, start of B should read "a portion of parking spaces required for one use may be used to meet the parking requirements of another." And that the way it's written, 'parking spaces required for one use may be used to meet the parking requirements of another' is not what the Board intended. Page #4, Line 10: "county registry at owner's expense", believes it should be "owners' expense with an S" because it's between two different owners. D – "Shared parking agreement between adjacent lots require adequate and safe pedestrian access and shall be provided to and from shared parking" doesn't make sense and a suggested modification is: "shared parking agreements between adjacent lots require adequate and safe pedestrian access" – delete "it shall be provided" and then go from there.

Mr. Haskett asked Chairman Williams what is 'the portion' and at one point there was a 50% requirement and was discussed on what value it should be and it was decided not to have any #; but adding in does it mean that they can take all the parking spaces at one time and Chairman Williams stated "yes". Mr. Haskett stated it would be the Zoning Administrator's discretion and that parking requirements are very specific where there has to have "X" amount of spaces/each use on each site and by saying 'a portion' muddies the water. Mr. Strader stated that the Applicant would still be required to come before the Planning Board and could be addressed as a Conditional Use Permit and that would work.

Mr. Haskett suggested to add to the very end of "B" which "shall be established in the Conditional Use Permit" and that would leave no question who and when decides what the 'portion' is and the Applicant agreed. Chairman Williams asked if it was in the Conditional Use Permit or in the Parking Agreement and Mr. Haskett stated the Conditional Use Permit and it would be between them to work out the Agreement. The Town would have to be the one to approve how many spaces the Town is allowing to be shared.

Mr. Neal made a motion to recommend ZTA-18-01 as amended the Town Council. Mr. Wyder seconded the motion and the motion passed unanimously. Mr. Haskett clarified that on the recommendation, this will also include the recommendation that the ZTA is consistent with the Town's currently Adopted Land Use Plan on Page 8/9, Article #4.

Public Comment: None

- Planning Board Members: Chairman Williams stated that at the next meeting with be the Special Meeting on April 9, 2018 which will start at 1pm on Module 1 Review on the Footnotes.
- The April 16, 2018 meeting has three ZTAs to be addressed and one Conditional Use Permit; one with the Southern Shores Volunteer Fire Department Building replacement and the other Lot Coverage Reconsideration that Councilman Nassan wants the Board to consider and the third is a combination ZTA and Conditional Use Permit at the same time for a free-standing ice cream shop to be located between the Wells Fargo and the Yadkin Bank.
- Mr. Neal made the motion to adjourn and Chairman Williams adjourned the meeting at approximately 9:35pm.

**VII. NEW BUSINESS:**  
None.

**VIII. PUBLIC COMMENT:**

None.

**IX. PLANNING BOARD MEMBER COMMENTS:**

None.

**X. ANNOUNCEMENTS:**

Chairperson Williams stated that a Special Meeting to continue discussion of the footnotes in Module One of the Town Code Update project will be held on April 9, 2018 at 1:00 p.m. The following meeting will be held on April 16, 2018 to consider three ZTA's and one Conditional Use Permit. One ZTA with the Southern Shores Volunteer Fire Department Building replacement. The second ZTA for Lot Coverage Reconsideration that Councilman Nason wants the Board to consider. The third is a combination ZTA and Conditional Use Permit at the same time for a free-standing ice cream shop to be located between the Wells Fargo bank and the Yadkin Bank.

**XI. ADJOURNMENT:**

Glenn Wyder motioned to adjourn. John Finelli seconded the motion. The motioned passed unanimously and the meeting adjourned at 9:35 p.m.

ATTEST:

  
\_\_\_\_\_  
Glenn Wyder, Chairperson

RESPECTFULLY SUBMITTED:

  
\_\_\_\_\_  
Wes Haskett, Town Planner

## STAFF REPORT

**To:** Southern Shores Planning Board  
**Date:** March 15, 2018  
**Case:** VA-18-01  
**Prepared By:** Wes Haskett, Town Planner/Code Enforcement Officer

### GENERAL INFORMATION

**Applicant:** Gray Berryman  
 37 Skyline Rd.  
 Southern Shores, NC 27949

**Requested Action:** Variance from Section 36-202, (d), Dimensional Requirements for the RS-1 Single-family Residential District

**PIN #:** 986707791383  
**PARCEL#:** 021910000  
**Location:** 155 Ocean Blvd. (Lot 9)  
**Zoning:** RS-1, Single-Family Residential District

**Existing Land Use:** "Residential"

#### **Surrounding Land Use & Zoning:**

**North-** Residential; RS-1, Single-Family Residential District  
**South-** Residential; RS-1, Single-Family Residential District  
**East-** Residential; RS-1, Single-Family Residential District  
**West-** Residential; RS-1, Single-Family Residential District

**Physical Characteristics:** Vacant

**Applicable Regulations:** Chapter 36, Zoning Ordinance: Article III, Interpretation and Definition of Terms; Article V, Nonconformities; Article VII, Schedule of District Regulations, Article XII, Board of Adjustment.

### ANALYSIS

The applicant is requesting a variance of three feet on both (north and south) side yard setback requirements. The applicable side yard setback requirements in the RS-1 Single-Family Residential District is 15 ft. The width of the subject property is 50 ft. which would result in a single-family dwelling that could not exceed 20 ft. in width if the applicable side yard setback requirements are met. The subject property currently contains a single-family dwelling that also sits on the adjacent 50 ft. wide lot that is under same ownership.

Section 36-367 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment, shall vary any of the provisions of the Zoning Ordinance upon a showing of all of the following:

- (1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
  - There is no unnecessary hardship because the subject property is currently, and can continue to be, used for a single-family dwelling.
  - The subject property is 50 ft. wide with 15 ft. side yard setback requirements which leaves a width of 20 ft. for development. To the best of Town Staff's knowledge, there are no existing 20 ft. wide single-family dwellings in the Town.
  - The subject property is adjacent to another 50 ft. wide lot under same ownership. The area of both 50' x 200' lots when combined results in a parcel established by the Dare County Tax Dept. (Parcel# 021910000) that meets the Town's minimum lot size of 20,000 sq. ft. which could easily accommodate a single-family dwelling much wider than 26 ft.
  - Building a 20 ft. wide single-family dwelling on one 50 ft. wide lot is not a hardship since the subject property could be recombined with the adjacent 50 ft. wide lot to construct a single-family dwelling that could be as wide as 70 ft. if constructed to meet the Town's current side yard setback requirements of 15 ft.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
  - There are many 50 ft. wide lots of record in the Town that are adjacent to one or more 50 ft. wide lots that contain a single-family dwelling and are under same ownership.
  - Since 2015, at least six new single-family dwellings have been constructed on a parcel that once consisted of two 50 ft. wide lots that were recombined.
- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
  - The subject property is a lot of record that was established prior to the Town's incorporation with a width of 50 ft. and subsequently purchased by the current owner.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
  - The Town's Zoning Ordinance allows for development on nonconforming lots of record. Section 36-132, (a), (1) states that in any district in which single-family dwellings are permitted, a single-family dwelling and customary accessory buildings may be erected on any single lot of record on the effective date of adoption of the ordinance from which the chapter is derived, notwithstanding limitations imposed by other provisions of the chapter. These provisions shall apply even though such lot fails to meet the requirements for area or width, that are generally applicable in the district provided that yard dimensions and

requirements other than these applying to area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variance of yard requirements shall be obtained only through action of the Board of Adjustment as established in article XII of the chapter.

## STAFF REPORT

**To:** Southern Shores Planning Board  
**Date:** March 15, 2018  
**Case:** VA-18-02  
**Prepared By:** Wes Haskett, Town Planner/Code Enforcement Officer

### GENERAL INFORMATION

**Applicant:** Gray Berryman  
37 Skyline Rd.  
Southern Shores, NC 27949

**Requested Action:** Variance from Section 36-202, (d), Dimensional Requirements for the RS-1 Single-family Residential District

**PIN #:** 986707791383  
**PARCEL#:** 021910000  
**Location:** 155 Ocean Blvd. (Lot 10)  
**Zoning:** RS-1, Single-Family Residential District

**Existing Land Use:** "Residential"

#### **Surrounding Land Use & Zoning:**

**North-** Residential; RS-1, Single-Family Residential District

**South-** Residential; RS-1, Single-Family Residential District

**East-** Residential; RS-1, Single-Family Residential District

**West-** Residential; RS-1, Single-Family Residential District

**Physical Characteristics:** Vacant

**Applicable Regulations:** Chapter 36, Zoning Ordinance: Article III, Interpretation and Definition of Terms; Article V, Nonconformities; Article VII, Schedule of District Regulations, Article XII, Board of Adjustment.

### ANALYSIS

The applicant is requesting a variance of three feet on both (north and south) side yard setback requirements. The applicable side yard setback requirements in the RS-1 Single-Family Residential District is 15 ft. The width of the subject property is 50 ft. which would result in a single-family dwelling that could not exceed 20 ft. in width if the applicable side yard setback requirements are met. The subject property currently contains a single-family dwelling that also sits on the adjacent 50 ft. wide lot that is under same ownership.

Section 36-367 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment, shall vary any of the provisions of the



## Zoning Ordinance upon a showing of all of the following:

- (5) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- There is no unnecessary hardship because the subject property is currently, and can continue to be, used for a single-family dwelling.
  - The subject property is 50 ft. wide with 15 ft. side yard setback requirements which leaves a width of 20 ft. for development. To the best of Town Staff's knowledge, there are no existing 20 ft. wide single-family dwellings in the Town.
  - The subject property is adjacent to another 50 ft. wide lot under same ownership. The area of both 50' x 200' lots when combined results in a parcel established by the Dare County Tax Dept. (Parcel # 021910000) that meets the Town's minimum lot size of 20,000 sq. ft. which could easily accommodate a single-family dwelling much wider than 26 ft.
  - Building a 20 ft. wide single-family dwelling on one 50 ft. wide lot is not a hardship since the subject property could be recombined with the adjacent 50 ft. wide lot to construct a single-family dwelling that could be as wide as 70 ft. if constructed to meet the Town's current side yard setback requirements of 15 ft.
- (6) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
- There are many 50 ft. wide lots of record in the Town that are adjacent to one or more 50 ft. wide lots that contain a single-family dwelling and are under same ownership.
  - Since 2015, at least six new single-family dwellings have been constructed on a parcel that once consisted of two 50 ft. wide lots that were recombined.
- (7) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
- The subject property is a lot of record that was established prior to the Town's incorporation with a width of 50 ft. and subsequently purchased by the current owner.
- (8) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
- The Town's Zoning Ordinance allows for development on nonconforming lots of record. Section 36-132, (a), (1) states that in any district in which single-family dwellings are permitted, a single-family dwelling and customary accessory buildings may be erected on any single lot of record on the effective date of adoption of the ordinance from which the chapter is derived, notwithstanding limitations imposed by other provisions of the chapter. These provisions shall apply even though such lot fails to meet the requirements for area or width, that are generally applicable in the district provided that yard dimensions and

requirements other than these applying to area or width, or both, of the lot shall conform to the regulations for the district in which such lot is located. Variance of yard requirements shall be obtained only through action of the Board of Adjustment as established in article XII of the chapter.

## STAFF REPORT

**To:** Southern Shores Planning Board  
**Date:** March 15, 2018  
**Case:** VA-18-03  
**Prepared By:** Wes Haskett, Town Planner/Code Enforcement Officer

### GENERAL INFORMATION

**Applicant:** Robert H. Moore  
381 North Main St.  
Mars Hill, NC 28754

**Requested Action:** Variance from Section 36-202, (d), Dimensional Requirements for the RS-1 Single-family Residential District

**PIN #:** 986716932623  
**PARCEL#:** 022418000  
**Location:** 46 Spindrift Trl.  
**Zoning:** RS-1, Single-Family Residential District

**Existing Land Use:** "Residential"

#### **Surrounding Land Use & Zoning:**

**North-Residential;** RS-1, Single-Family Residential District  
**South-Residential;** RS-1, Single-Family Residential District  
**East-Conservation;** RS-1, Single-Family Residential District  
**West-Residential;** RS-1, Single-Family Residential District

**Physical Characteristics:** Developed

**Applicable Regulations:** Chapter 36, Zoning Ordinance: Article III, Interpretation and Definition of Terms; Article V, Nonconformities; Article VII, Schedule of District Regulations, Article XII, Board of Adjustment.

### ANALYSIS

The applicant is requesting a variance to allow a previously constructed cantilevered deck and ground level deck and stairs that encroach the applicable 25 ft. rear setback requirement. Following inspection of the file for the subject property, Town Staff determined that a building permit was issued for the cantilevered deck on September 27, 1999 and that no permit was issued for the ground level deck and stairs. A building permit was subsequently issued for a swimming pool and separate deck on October 9, 2007 which are both in compliance with all applicable setback requirements.

Section 36-57 defines "Yard" (setback) as a required open space, other than a court, unoccupied and unobstructed by any structure or portion of a structure, from 30 inches above the ground level of the graded lot upward, provided, however, that fences, walls, poles, posts, ocean dune platforms, walks, accessible ramps, steps and other customary yard accessories, ornaments, and furniture may be permitted in any yard subject to height limitations and requirements limiting obstruction of visibility or any other requirements of this chapter. Based on this definition, decks and stairs that are less than 30 inches above the ground have been permitted but all decks and stairs that are greater than or equal to 30 inches in height must meet the applicable setback requirements. Cantilevered decks or cantilevered portions of single-family dwellings are currently required to meet all applicable setback requirements

Section 36-367 of the Town Zoning Ordinance establishes that the Planning Board, when performing the duties of the Town Board of Adjustment, shall vary any of the provisions of the Zoning Ordinance upon a showing of all of the following:

- (9) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
  - With respect to the ground level deck and stairs, the property owners' loss will be deck area for sitting, sunning, and dining. The required abatement of a violation that results in a smaller deck area does not arise to an unnecessary hardship. Although the property owners claim to have relied on a contractor, strict application of the ordinance would not have allowed the ground level deck and stairs in that location and the use of the single-family dwelling and deck area that meets the applicable 25 ft. rear setback requirement would have continued.
  - With respect to the cantilevered deck, the property owners' loss would also be deck area for sitting, sunning, and dining.
- (10) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
  - There is nothing peculiar about this parcel of property which gives rise to a hardship. It's location, size, shape and topology are similar to other lots within the Town.
- (11) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
  - The property owners hired a contractor to construct the ground level deck and stairs. In doing so, the contractor acted as the agent for the property and the property owners' issue lie with the contractor.
  - With respect to the cantilevered deck, Town Staff acknowledges that a permit was issued for the project and a final inspection was conducted on November 12, 1999.
- (12) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

- The intent of Section 36-202 which establishes the applicable rear setback requirement of 25 ft. is to provide for the low-density development of single-family detached dwellings in an environment which preserves sand dunes, coastal forests, wetlands, and other unique natural features of the coastal area. The district is intended to promote stable, permanent neighborhoods characterized by low vehicular traffic flows, abundant open space, and low impact of development on the natural environment and adjacent land uses. Public safety and substantial justice cannot be served by allowing someone to maintain an uninspected, unpermitted and unlawful ground level deck and stairs. To do so would be contrary to the ordinances, laws, rules and regulations which were violated by the property owners, and would allow the property owners to disregard regulations that others must abide by.

## STAFF REPORT

**To:** Southern Shores Planning Board  
**Date:** March 15, 2018  
**Case:** ZTA-18-01  
**Prepared By:** Wes Haskett, Town Planner/Code Enforcement Officer

### GENERAL INFORMATION

**Applicant:** Southern Shores Crossing, LLC  
P.O. Box 150  
Kitty Hawk, NC 27949  
(252) 261-2000

**Applicant's Representative:** Michael W. Strader, Jr., P.E.  
Quible & Associates, P.C.  
P.O. Drawer 870  
Kitty Hawk, NC 27949  
(252) 491-8147

**Requested Action:** Amendment of the Town Zoning Ordinance by amending Section 36-163, Off-street Parking Requirements

### ANALYSIS

The applicant is proposing to amend the Town Zoning Ordinance by amending Section 36-163, Off-street Parking Requirements by adding language to allow shared parking as a Conditional Use. Following issuance of a Conditional Use Permit, the proposed language would allow the following: Within any one site, or on contiguous commercial sites, the required parking for any number of separate uses may be combined on the site or sites, but the number of parking spaces assigned to one use may not be assigned to another use, except as provided in the proposal. Parking spaces required for one use may be used to meet the parking requirements of another use on the same, or on contiguous commercial, parcel(s) when the peak hours of operation and parking demands of the uses occur at different times of day. Prior to approval of the Conditional Use Permit, a shared parking agreement, in recordable form and executed by both property owners sharing parking, shall be submitted to the Town.

The Town's currently adopted Land Use Plan contains the following Policy that is applicable to the proposed ZTA:

- **Policy 2:** The community values and the Town will continue to comply with the founder's original vision for Southern Shores: a low density residential community comprised of single family dwellings on large lots (served by a small commercial district for convenience shopping and services located at the southern end of the Town. This blueprint for land use naturally protects environmental resources and fragile areas by limiting development and growth.

**RECOMMENDATION**

Town Staff has determined that the proposed amendment is consistent with the Town's currently adopted Land Use Plan and Town Staff recommends that the Board consider this when making its recommendation to the Town Council. Please note that prior to adopting or rejecting any zoning amendment, the Planning Board shall adopt a statement describing whether its action is consistent with the adopted Town Comprehensive Land Use Plan and explaining why the Planning Board considers the action taken to be reasonable and in the public interest. That statement is not subject to judicial review.